Supreme Finance (M) Bhd v Mohamad Noor (t/a Everway Food Centre) & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO C 2484 OF 1985
ZAKARIA YATIM J
11 FEBRUARY 1993

Bankruptcy *— Practice and procedure — Setting aside judgment in default of appearance — Whether prior sanction of official assignee required before application for setting aside can be made — Bankruptcy Act 1967 s 38(1)*

Civil Procedure *— Judgment in default of appearance — Setting aside — Whether sanction of official assignee required for purpose of such application — Whether bankrupt has locus standi to file such application*

This was an appeal by the third defendant against the decision of the senior assistant registrar ordering that the third defendant, who was an undischarged bankrupt, first obtain the sanction of the official assignee under s 38(1) of the Bankruptcy Act 1967 ('the Act') before making an application to set aside the judgment in default of appearance.

Held, dismissing the appeal:
The only way in which a bankrupt could contest a judgment is to apply to the bankruptcy court for an order to rescind and annul the receiving and adjudication orders, inter alia, on the grounds that the judgment was obtained by fraud, or collusion or that there has been some miscarriage of justice. In the present case, the words '... shall be incompetent to maintain any action ...' in s 38(1) of the Act refer not only to writ action or any of the proceedings under O 5 r 1 but also refer implicitly to an application to set aside judgment in default. While the receiving and adjudication orders stand, the third defendant cannot contest the petitioning creditors' judgment in any other court except the bankruptcy court. Since the third defendant was an undischarged bankrupt, he was therefore not competent to apply to set aside the default judgment and to file the present appeal without the previous sanction of the official assignee.

[**Bahasa Malaya summary**

Ini merupakan satu rayuan dari defendan ketiga terhadap keputusan penolong kanan pendaftar yang mengarahkan supaya defendan ketiga, seorang bankrap yang belum dilepaskan, mesti terlebih dahulu memperolehi kebenaran pegawai pemegang serahhak di bawah s 38(1) Akta Kebankrapan 1967 ('Akta itu') sebelum membuat permohonan untuk mengenepikan penghakiman keingkaran kehadiran.

Diputuskan, menolak permohonan itu:
Seorang bankrap hanya boleh mempersoalkan suatu penghakiman dengan memohon kepada mahkamah kebankrapan untuk satu perintah

membatalkan dan memansuhkan perintah penerimaan dan penghukuman, antara lain, atas alasan bahawa penghakiman itu telah diperolehi secara fraud, pakat-sulit atau bahawa terdapat salah laksana keadilan. Di dalam kes ini, perkataan '... shall be incompetent to maintain any action ...' di dalam s 38(1) Akta itu tidak hanya merujuk kepada tindakan writ atau sebarang prosiding di bawah A 5 K 1 tetapi juga merujuk secara implisit kepada suatu permohonan untuk mengenepikan suatu penghakiman ingkar. Selagi perintah penerimaan dan penghukuman wujud, defendan ketiga tidak boleh mempersoalkan penghakiman pemiutang mempetisyen di dalam mana-mana mahkamah melainkan mahkamah kebankrapan. Oleh kerana defendan ketiga adalah seorang bankrap yang belum dilepaskan, beliau tidak kompeten memohon mengenepikan penghakiman ingkar itu dan untuk memfailkan rayuan masakini tanpa kebenaran pegawai pemegang serahhak.]

Notes

For a case on the setting aside of a default judgment in the case of a bankrupt, see 1 *Mallal's Digest* (4th Ed) para 1154.

Cases referred to

1 *Re Khoo Kim Hock* [1974] 2 MLJ 29 (refd)
2 *Re Sebastian, ex p Metroplex Leasing & Credit Corp Sdn Bhd* [1990] 3 MLJ 248 (distd)
3 *Boaler v Power & Ors* [1910] 2 KB 229 (refd)
4 *Re Flatau, ex p Scotch Whisky Distillers Ltd* (1888) 22 QBD 83 (refd)
5 *The Metropolitan Bank Ltd and Arthur Cooper v Alexander Gopsell Pooley* (1885) 10 App.Cas 211 (refd)

Legislation referred to

Bankruptcy Act 1967 s 38(1)

Shaharudin bin Ali (*Shaharudin, Sham Sunder & Partners*) for the defendants.

CM Phang (*Mah & Din*) for the plaintiff.

Cur Adv Vult

Zakaria Yatim J: This is an appeal by the third defendant against the decision of the senior assistant registrar given on 28 February 1992 ordering that the third defendant who is an undischarged bankrupt must first obtain the sanction of the official assignee Malaysia under s 38(1) of the Bankruptcy Act 1967 ('the Act') for the purpose of making an application to set aside the judgment in default of appearance.

At the hearing of the appeal, the only issue for the court to decide was whether the bankrupt required the sanction of the official assignee under s 38(1) of the Act in order to proceed with the application to set aside the judgment in default of appearance.

A Encik Shaharuddin, counsel for the third defendant submitted that no such sanction was required for the purpose of an application to set aside a default judgment.

In order to determine this issue it is necessary to examine s 38(1)(a) of the Act which states as follows:

B (1) Where a bankrupt has not obtained a discharge:

(a) the bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the Official Assignee.

The crucial words in the section quoted above are 'the bankrupt shall be C incompetent to maintain any action'.

The Act does not define the word 'action'. Under the Courts of Judicature Act 1964 the word 'action' is defined as a civil proceeding commenced by writ or in such other manner as is prescribed by rules of the court. Order 5 r 1 of the Rules of the High Court 1980 provides that civil D proceedings in the High Court may be begun by writ, originating summons, originating motion or petition.

It is quite clear that a bankrupt is incompetent to commence an action by writ or by any of the modes provided in O 5 r 1.

The question to be considered here is whether an undischarged bankrupt is competent to make an application by summons-in-chambers to set E aside judgment in default of appearance without the prior sanction of the official assignee. The case of *Re Khoo Kim Hock*[1] was cited by Encik Shaharuddin. In that case, the question before the court was whether a bankrupt could make an application under ss 92(1) and 105(1) of the Act without the previous sanction of the official assignee. Mohd Azmi J (as he F then was), ruled that no previous sanction was required for such an application. In his judgment at pp 30 and 31, the learned judge said:

> Accordingly, just as right of action in respect of personal damage and injury (which is excluded under s 38(1)(a) from prior sanction) is a cause of action to the benefit of which the estate is not entitled, the application in the present case is one which from its nature does not vest in the official assignee. Under the G circumstances, I hold that s 38(1)(a) does not apply to an application under ss 92(1) and 105(1) of the Bankruptcy Act, where a bankrupt is seeking the court's discretion to review, rescind or vary any order made by it, and as such no previous sanction of the official assignee is necessary in the present case.

Encik Shaharuddin next referred to the case of *Re Sebastian, ex p Metroplex* H *Leasing & Credit Corp Sdn Bhd*[2] in particular to a passage in the judgment of VC George J at p 250. The passage reads:

> Now while a bankrupt cannot bring an action to set aside a judgment even if it was obtained fraudulently because the cause of action is vested in his trustee, the bankruptcy court is entitled to enquire into the validity of a judgment on which I the bankruptcy proceedings was founded even though it has not been set aside — see Wilkinson & Mair, Hunter on *The Law and Practice of Bankruptcy* (19th Ed) at p 147.

Encik Shaharuddin next referred to the relevant passage in Wilkinson & Mair, Hunter on the *Law and Practice of Bankruptcy* (19th Ed) at p 147,

which was relied upon by VC George J in *Re Sebastian*.[2] The relevant passage reads as follows:

> Where the proceedings are founded on a judgment, the court may inquire into the validity of the judgment for any sufficient reason, such as fraud; but the bankrupt cannot bring an action to set aside, on any ground, while the adjudication stands, for the cause of action is vested in his trustee.

According to Encik Shaharuddin, the principle enunciated in the above passage was based on the decision of the English Court of Appeal in *Boaler v Power & Ors*[3] where the action was commenced by a writ by a person, who was later adjudicated a bankrupt.

In the *Boaler* case,[3] the facts are that the plaintiff brought two actions against the defendants in the Chancery Division. Both actions were dismissed by Joyce J. The plaintiff appealed against the decisions of Joyce J in respect of one action but his appeal was dismissed by the Court of Appeal. He then brought a writ action, this time in the Kings Bench Division, asking the court to set aside the two orders of Joyce J and the order of the Court of Appeal, on the ground of fraud. He also claimed damages. A few months later the plaintiff was adjudicated a bankrupt. The official receiver declined to take any steps in the third action. The defendants applied that the action be dismissed and the court allowed the application. The plaintiff who was already a bankrupt appealed to the Court of Appeal. The appeal was dismissed. Farwell LJ in delivering the judgment of the Court of Appeal said at p 232 as follows:

> It is open to the court in bankruptcy, if it thinks fit, to allow the debtor to contest in the bankruptcy court the validity of the petitioning creditor's judgment on the ground of fraud, collusion, or for any other sufficient reason: *Re Flatau* (1888) 22 QBD 83. But this is the only way in which the bankrupt can contest it: the adjudication, while it stands, is conclusively binding on him: he cannot contest it in any other court on the ground of fraud or on any other ground. The right to continue these three actions is a chose in action vested in the trustee, and the bankrupt has no locus standi: ...

It is clear that in the *Boaler* case,[3] the bankrupt proceeded with a writ action.

In *Re Sebastian*,[2] judgment in default of appearance was entered against the defendant. The defendant applied to have the default judgment set aside but his application was dismissed with costs. Subsequently, receiving and adjudicating orders were made against the defendant. After the said orders were made, the bankrupt applied to the bankruptcy court to review, rescind or annul the adjudication order. VC George J went behind the judgment and decided that the judgment should not be allowed to stand. The learned judge accordingly set aside the receiving and adjudicating orders.

It is to be noted that in *Re Sebastian*,[2] VC George J was sitting in the bankruptcy court.

In my opinion, the only way in which a bankrupt can contest a judgment is to apply to the bankruptcy court for an order to rescind and annul the receiving and adjudication orders. In his application to the bankruptcy court, he can ask the court to annul and rescind the receiving and adjudicating orders on the ground that the judgment was obtained by fraud, or

collusion or there has been miscarriage of justice or on any other ground. The bankruptcy court will go behind the judgment if there is evidence that the judgment has been obtained by fraud or collusion or that there has been some miscarriage of justice (See *Re Flatau.*[4])

The situation in the present case is therefore different from that in *Re Sebastian.*[2]

In the present case, it is my view that the words, '... shall be incompetent to maintain any action ...' in s 38(1)(a) of the Act refer not only to writ action or any of the proceedings under O 5 r 1 but also refer implicitly to an application to set aside judgment in default. While the receiving and adjudication orders stand, the third defendant cannot contest the petitioning creditors judgment in any other court except the bankruptcy court. As a bankrupt he has no locus standi to file the present application. (*The Boaler* case[3].) See also *The Metropolitan Bank Ltd and Arthur Cooper v Alexander Gopsell Pooley.*[5]

Since the third defendant is an undischarged bankrupt, he is therefore not competent to apply to set aside the default judgment and to file the present appeal without the previous sanction of the official assignee.

For the reasons stated above, the appeal is dismissed with costs.

Appeal dismissed.

Reported by Yap Foo Ken